109 FERC ¶ 61,189
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

PSEG Power In-City I, LLC

v. Docket No. EL04-126-000

Consolidated Edison Company
of New York, Inc.

ORDER ON COMPLAINT

(Issued November 22, 2004)

1. In this order, we grant a complaint by PSEG Power In-City I, LLC (In-City) requesting that the Commission revise In-City's interconnection agreement (IA)[1] with Consolidated Edison Company of New York, Inc. (ConEd) to give In-City an additional 18 months (until November 2007) to complete the construction of certain facilities needed to accommodate its interconnection with ConEd (now due to be completed by May 2006). This order benefits customers by fostering prompt completion of this interconnection, under just and reasonable terms and conditions.

Background

[1] In *Consolidated Edison Company of New York, Inc.*, 101 FERC ¶ 61,185 (2002) (*ConEd*), the Commission approved, with certain modifications, an unexecuted IA filed with the Commission when In-City and ConEd were unable to reach agreement on the terms of the proposed IA. The project interconnects the Bergen No. 2 generator (Bergen 2), a 1200 MW generator unit owned by In-City's affiliate, PSEG Power, LLC, with the ConEd system at ConEd's 49th Street Substation, through the construction of a 345 kV alternating current generator lead. The vacant bus position at the 49th Street Substation is valuable because it takes up the last available spot for an interconnection at that location. The order found that installation of certain facilities (Series Reactors) by ConEd was necessary before interconnection with Bergen 2 could occur.

2. In-City contends that ConEd is being unreasonable in opposing its request for an 18 month extension and that the delays in construction were caused by factors beyond its control related to: (1) a one year delay by ConEd in the installation of certain facilities (Series Reactors) whose availability is a prerequisite to interconnection; (2) unforeseen delays caused by issues as to the identification and allocation of the costs of the Series Reactors and the difficulties encountered in reaching a settlement of these issues (settlement was not reached until June 2004); [2] (3) the inability of the parties to reach agreement on engineering details and on calculating the costs of In-City's share of attachment facility costs and the cost of the vacant bus position related to In-City's interconnection to the West 49th Street Substation.

Notice, Comments, and Interventions

3. Notice of In-City's Complaint was published in the *Federal Register*, 69 Fed. Reg. 53,055 (2004), with notices, motions, or protests due on or before September 13, 2004. Timely motions to intervene were filed by ConEd, Conjunction LLC (Conjunction), and the New York Independent System Operator, Inc. (NYISO). Conjunction's motion was accompanied by comments supporting ConEd's position. In addition, a notice of intervention and protest was filed by the New York State Public Service Commission (New York Commission).

4. ConEd filed an answer to the complaint stating that the real reason for In-City's delay in preparing for the interconnection was that In-City did not want to proceed with construction on the project and delayed construction for nearly a year and a half until it had lined up a long term purchase power agreement for the sale of the output of its Bergen 2 facility; thus, the excuses raised by In-City in its complaint did not need to hold up construction. ConEd argues that In-City has already received one 18 month extension on the project and that another such extension is not warranted.[3] ConEd also argues that construction could have proceeded on schedule, despite the factors cited by In-City, and that the 18 month hold-up in the project (while it waited for these issues to be resolved) was entirely within In-City's control. Thus, ConEd argues that the schedule prescribed in the IA remains just and reasonable and needs no extension. Finally, ConEd adds that, if the Commission grants In-City the requested 18 month extension, it should impose

[2] *See KeySpan Energy Development Corp. v. New York Independent System Operator, Inc.*, 108 FERC ¶ 61,201 (2004).

[3] *See ConEd* at P 36.

guarantees within a specified time, to assure that the project does not drag on without timely completion.

5. In response to ConEd's answer, In-City filed a motion for leave to file an answer and an answer. In-City argues that the Commission should allow its answer so that it can rebut several misstatements it contends were made by ConEd in its answer. Specifically, In-City contends that it never suspended the project as maintained by ConEd and, contrary to assertions by ConEd, it has not previously received an extension to the schedule laid out in the IA.

6. The New York Commission argues that the Commission should deny In-City's request for modification of the IA "with the understanding that In-City may request extension of the interconnection date after it demonstrates that it is fully prepared to construct its project in a timely manner." The New York Commission objects to In-City's formulation of the issue, *i.e.*, that it will use the extension as a means to obtain needed financing, places the matter backwards and that an extension should not be granted unless In-City demonstrates that it is ready, willing, and able to complete the construction if it obtains the extension. The New York Commission further maintains that the vacant bus position at the West 49th Street Substation is a valuable asset and an extension should be granted only after In-City demonstrates that it will complete the construction in a timely manner.

7. In-City's complaint was accompanied by an affidavit from Thomas Piascik that, among other matters, contained a characterization of Conjunction's progress on its Empire Connection (EC) Project (Piascik Affidavit at P 43). Conjunction's comments on the complaint are focused on Mr. Piascik's characterization of Conjunction's progress on the EC Project. Conjunction wishes to underscore that its EC Project is as far along as is In-City's and it states that both projects will require a purchase power agreement to proceed. Likewise, Conjunction notes that both projects have encountered difficulties in meeting their milestones. In Conjunction's case, the difficulty it faced was that it was unable to conduct a February 27, 2004 auction. Conjunction states that, although the two competing projects face different obstacles, the difficulties they face are comparable, and Conjunction believes that both projects are on a comparable timetable that will allow the two projects to be completed as early as 2007, and no later than February 1, 2008.

8. Finally, Conjunction agrees with In-City that the Series Reactors are needed to avoid *bona fide* short circuit problems and that these problems should not be underestimated. However, Conjunction wishes to emphasize that its own project will not face this obstacle (because its project is a direct current project) and thus disagrees with In-City's contention that Series Reactor cost issues will cause significant financial and

planning uncertainty for *all* developers.

9. On October 18, 2004, Commission staff sent In-City a letter requesting additional information regarding its complaint. To determine the progress being made on certain construction issues, staff asked In-City to report, among other matters, on whether it had been billed for the work.

10. On October 21, 2004, In-City filed its response to the staff letter stating that, while it is far along in the development process for its construction of the generator lead line for the 49th Street Substation, and has obtained all major regulatory authorizations for this project, physical construction of the project has not yet started. Further, In-City reports that ConEd has not constructed the facilities necessary to connect In-City's facilities to ConEd's system, nor has ConEd billed In-City for these costs. Thus, there has been no need for In-City to establish a letter of credit covering the payment of these costs as of yet. In addition, In-City reports that the allocation of costs for the construction by ConEd of the Series Reactors, estimated to cost $124 million is governed by Attachment S to the NYISO Tariff and that In-City will share in the payment of these costs, but that it has not yet been called upon to make any payments for this construction.

11. On October 28, 2004, the Commission issued a notice of In-City's amendment to its complaint (*i.e.*, In-City's response to the staff's October 18, 2004 Letter). The notice allows interventions or protests to the filing to be made on or before November 8, 2004. ConEd filed comments on In-City's response, emphasizing that the only reason why the installation of facilities at the Con-Ed substation has been deferred is that In-City has declined to execute a Service Agreement authorizing ConEd to perform the work.

Discussion

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the unopposed motions to intervene and the New York Commission's notice of intervention serve to make the entities that filed them parties to the proceeding. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will allow In-City's answer because it has provided information that assisted us in our decision-making process.

13. In assessing whether it was reasonable for ConEd to refuse In-City's request for an 18 month extension to the construction schedule, our starting point is to look at the Commission's precedent on granting extensions in such cases. The Commission has traditionally favored the granting of reasonable extensions "to create an opportunity for

generation to develop" under certain circumstances. *Florida Power & Light Company*, 98 FERC ¶ 61,226 at 61,895-96, *order on reh'g*, 99 FERC ¶ 61,318 (2002) (*Florida Power*). In evaluating such requests, the Commission has looked to whether the applicant was committed to funding the needed system upgrades and whether the extension being granted would harm lower-queued generators. After consideration of these factors, the Commission granted the generator the requested 18 month extension. This precedent was followed in the *ConEd* case that approved the original IA between the parties. *ConEd* at P 36. The Commission has also granted the requests of other generators under similar circumstances. *See, e.g.*, *Duke Energy Corp.*, 100 FERC ¶ 61,251 at P24 (2002); *Florida Power & Light Company*, 98 FERC ¶ 61,326 at P 87-88 (2002).

14. The issue of time extensions to allow generators to complete system upgrades accompanying an interconnection with a transmission provider was also addressed in *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. and Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. and Regs. ¶ 61,220 (2004), *reh'g pending*, the Commission rule governing the terms and conditions for interconnection agreements between generators and transmission providers. Consistent with our prior orders, Order Nos. 2003 and 2003-A are designed to enhance competition in bulk power markets by "removing barriers to the construction of new generation, and by promoting the development of a robust and reliable transmission system through grid enhancements, particularly in areas where entry barriers due to unduly discriminatory transmission practices may still be significant." Order No. 2003-A at P 579. While the IA at issue in this proceeding predates Order No. 2003, the rule nevertheless offers useful guidance as to IA terms and conditions that the Commission considers just and reasonable.

15. Consistent with our policy in prior cases, Order No. 2003 is intended to prevent transmission providers from frustrating competition by creating obstacles to impede the interconnection of new generators. Our policy favors extensions of the timetable for completion of interconnection construction projects for a cumulative period of three years, without regard to the cause of the delays, and regardless of whether those delays

are entirely attributable to factors within the control of the applicant.[4] In fact, under the

[4] The rules also provide, at section 4.4.5 of the Large Generator Interconnection Procedures, that extensions of less than three cumulative years in the Commercial Operation Date of the Generating Facility are not material and should be treated in the same manner as in section 12.3 (Construction Sequencing). Rejecting arguments that a

new rule, the Commission specifically recognizes that the planning process is affected by a variety of changes in circumstances,[5] and the rule is completely neutral regarding the cause of the delay. By eliminating consideration of the particular circumstances warranting an extension, the new rule allows generators an easier path to obtaining an extension.

16. We find that In-City has met the test laid out in *Florida Power*, *ConEd*, and in the other cases cited above. Specifically, In-City remains committed to funding the needed system upgrades and there is no evidence that granting the extension would harm lower-queued generators.

17. We find the argument of the New York Commission (that we should reject In-City's request until In-City demonstrates that it is making headway on the project, and that, thereafter, we should only grant an extension if accompanied by conditions) unpersuasive and reject a similar argument from ConEd. While keeping the project on schedule is a worthwhile goal, these arguments overlook the fact that the Commission's policy regarding the granting of time extensions (both before and after issuance of Order Nos. 2003 and 2003-A) recognizes that there are often obstacles to the generator and the transmission provider reaching agreement and that it would be counterproductive to set conditions on extensions (at least for extensions of up to three years) that the transmission provider could undermine through a lack of cooperation.

18. Thus, we find that In-City's request for an 18 month schedule extension in this proceeding is supported by the factors cited in its complaint and that granting this extension is consistent with the Commission's policy on interconnection schedule extensions as expressed in Order Nos. 2003 and 2003-A and in prior cases. For these same reasons, we find the existing IA between In-City and ConEd unjust, unreasonable

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three year period is too long a period for such extensions, the Commission recognized "that such flexibility places a burden on the Transmission Provider's expansion planning process, but these extensions in most cases are well within the scope of other unforeseen changes that affect the planning process." Order No. 2003 at P 177. Rejecting a request for rehearing of this finding, the Commission found that extensions are appropriate because "a planning process inevitably is affected by a variety of changes in circumstances." Order No. 2003-A at P 134.

[5] *See id.*

and unduly discriminatory under section 206 of the Federal Power Act (FPA)[6] and direct that the IA be modified to provide the requested 18 month extension.[7]

The Commission orders:

(A) In-City's request for a revision to the IA to extend the completion date for an additional 18 months until November 2007 is hereby granted, for the reasons discussed in the body of this order.

(B) ConEd is hereby directed to file with the Commission, within 30 days of the date of this order, a revised IA incorporating the 18 month extension referred to in paragraph (A) above, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[6] 16 U.S.C. § 824e (2000).

[7] We note that ordering this revision does not raise *Mobile-Sierra* type issues because the IA provides at section 5.07 (*see* In-City Ex. TP-2 at 34) that the parties shall negotiate in good faith any amendments to the IA (including schedule extensions) as are reasonably necessary to cure an impediment to performance and that if the parties are unable to reach agreement, then either party may unilaterally apply to the Commission to make a contract modification pursuant to sections 205 and 206 of the FPA, or under other applicable provisions.